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Innovations in Sentencing: The Use of Scarlet Letter Dispositions

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**INNOVATIONS IN SENTENCING:
THE USE OF SCARLET LETTER DISPOSITIONS**

A Thesis

Presented to the

Department of Criminal Justice

and the

Faculty of the Graduate College

University of Nebraska

In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

University of Nebraska at Omaha

by

Catherine A. Elwell

March 9, 1992

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THESIS ACCEPTANCE

Accepted for the faculty of the Graduate College, University of Nebraska, in partial fulfillment of the requirements for the Master of Arts degree, University of Nebraska at Omaha.

Thesis Committee

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There can be no outrage, me thinks, against our common nature--whatever be the delinquencies of the individual--no outrage more flagrant than to forbid the culprit to hide his face for shame; as it was the essence of this punishment to do. But the point which drew all eyes, and, as it were, transfigured the wearer--so that both men and women, who had been familiarly acquainted with Hester Prynne, were now impressed as if they beheld her for the first time--was that scarlet letter, so fantastically embroidered and illuminated upon her bosom. It had the effect of a spell, taking her out of the ordinary relations with humanity, and enclosing her in a sphere by herself.

*Nathaniel Hawthorne
"The Scarlet Letter"*

ABSTRACT OF THESIS

INNOVATIVE SENTENCING: THE USE OF SCARLET LETTER DISPOSITIONS

By Catherine A. Elwell

Scarlet letter sentencing dispositions are innovative alternatives to incarceration posited as special probation conditions granted to offenders deemed able to live in the community. These sanctions resemble scarlet letter punishments of the Seventeenth Century as illustrated in Nathaniel Hawthorne's *Scarlet Letter* for Hester Prynne. They are designed as bumper or windshield stickers, yard signs, screen prints on T-shirts, and public apologies. This study investigates the proliferation of these innovative penalties created by judges to require drunk drivers, sex offenders, thieves/burglars, white-collar criminals, and drug offenders to publicly disclose the nature of their crime and identify themselves as perpetrators. Societal and inmate attitudes toward crime and punishment are considered to determine if the threat of public exposure can deter criminal activity and protect the public. Convicted offenders' perception of probation as punishment versus incarceration is considered to determine whether they fear probation more than imprisonment. The legal context of judicial discretion and the use of scarlet letter dispositions suggests problems with judicial reviewability and the advantages and disadvantages of using scarlet letters to punish convicted offenders. An exploratory study of Nebraska's 4th Judicial District Judges was conducted. The feasibility of scarlet letter dispositions may only be meaningful to those judges who impose them.

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CHAPTER I

INTRODUCTION

In the past the promulgation of and justification for criminal penalties was public exhibitions. For example, in 1850, Nathaniel Hawthorne's *Scarlet Letter* described the plight of Hester Prynne, the adulteress forced to wear a scarlet "A" on her chest to show her crime (Hawthorne, 1986 ed.). This Seventeenth Century plight exemplifies punishment by public humiliation. By the mid-1780s political, social, and economic change discarded this form of punishment. The emergence of the criminal justice system altered these punishments to reflect more "humanitarian punishments" including factors such as age, liberal philosophy, and classical criminology; subsequently the use of these punishments declined. However, as history tends to repeat itself, so does the plight of Hester. Fear of crime and discontent with the criminal justice system has brought about a renewal of fascination with this type of punishment through modern scarlet letter¹ sentencing dispositions.

Scarlet letter sentencing dispositions are special probation conditions imposed on offenders (i.e., drunk drivers, sex offenders, thieves, burglars, white-collar criminals, and corporations) by judges or through plea negotiations. There is no clear, single definition of what they are, but this selected term is based on loosely defined sources that

¹"Scarlet Letter" is a media title identifying special probation conditions

appear to involve punishment or control outside of established traditional probation conditions. Scarlet letters are attributed to the growth of permissible probationary conditions designed as "symbolic," "designer," "creative," or "implied consent" community-based sentencing options (Klein, 1989: 1-7). These probation conditions require convicted offenders to publicly disclose their crime. Examples include the posting of bumper stickers on cars, signs on residences, wearing screen printed T-shirts stating the crime committed and the punishment, or publicly apologizing for the crime on local radio stations and in local newspapers (Brilliant, 1989: 1357-1385).

Probation was originally designed to rehabilitate; however, its present objective is offender control, with public protection as the central concern. There are three characteristic elements of probation: (1) release of the offender into the community (2) with certain conditions imposed (3) under the supervision of the probation department (Tavill, 1988: 621). Furthermore, there are three types of probation statutes providing judges with significant latitude to determine what conditions should be imposed. The first type authorizes the court to impose appropriate probation or parole conditions on the offender without any specific conditions. The second type requires some mandatory conditions, such as treatment programs. The third type lists specific conditions which are discretionary with the court (Tavill, 1988: 621). Statutes may enhance probation supervision by intermittent jail sentences, halfway house residency, and intensified reporting. Current emphasis on white-collar criminals has also increased probation

conditions which require restitution or provide punishment for offenders difficult to penalize, such as corporations.

In 1990, 2.6 million adults were on probation. One-half of these probationers are convicted felons (Jankowski, 1991: 1-7). Choice of probation and public attitudes toward punishment have increased interest in judicial sentencing choices which seek to warn and protect the public while punishing the felon or misdemeanor.

STATEMENT OF THE PROBLEM

The relationship between society and the criminal offender has undergone tremendous change since the Seventeenth Century. The simplistic view of good and evil has expanded to include the legality and efficacy of punishment. Recently, the courts have emphasized alternative sentencing to deter criminal activity, reduce prison overcrowding, and protect society (Zimring, 1973; McCabe, 1991; Lykos, 1992). One such alternative, scarlet letter dispositions, reverts to the historical concept of good and evil (Zimring, 1973). These dispositions warn and protect society and deter criminal offending through public humiliation. The conceptual idea is that shame and embarrassment will offer sufficient punishment, act as a deterrent to future criminality, avert offenders' present lifestyle, and warn and protect society. Scarlet letter probation conditions may also provide an economical community alternative to incarceration (Grasmick, et al, 1991: 233-251).

While shame can be self-imposed, embarrassment is normally a socially imposed sanction which may reduce the likelihood of continued criminal behavior (Grasmick, et

al, 1991: 235). In an interview, Karl Reddick (1992), an Oregon Probation Officer, stated that the threat of public embarrassment or contempt for persons becomes a specific deterrent for future criminality. Therefore, the following research problems are addressed:

1. How have scarlet letter dispositions evolved in the United States?
2. How might probation conditions be perceived as punishment by convicted offenders?
3. How do judges perceive the use of scarlet letter probation conditions as alternative sentences to incarceration?

The following chapters review the current uses of scarlet letter dispositions as probation conditions, convicted offenders' attitudes toward crime and punishment, and the legal context of judicial discretion. Advantages and disadvantages regarding the use of scarlet letter sentencing dispositions are discussed. An exploratory study of some of Nebraska's judges is included to gain knowledge about judicial attitudes toward the use and feasibility of scarlet letter dispositions. Conclusions, implications, and recommendations for further research are considered. Empirical evidence of scarlet letter dispositions is limited; therefore, most of the information is anecdotal from judges or probation officers.

CHAPTER II

CURRENT USES OF SCARLET LETTER DISPOSITIONS

Recognizing the problems of prison overcrowding and the desire of the public to live in a risk free environment, some courts not only impose traditional sentences, they are creatively designing and imposing special probation conditions on thieves, drunk drivers, drug addicts, sex offenders, and corporations who are difficult to penalize. These intermediate probation sanctions stem from some courts' attempts to make the punishment fit the crime while at the same time reducing prison populations and protecting the public by warning citizens that these offenders are "stalking" communities (Brilliant, 1989: 1363). It appears that scarlet letters fluctuate between what is considered punishment by public humiliation and what is or may be corrective and rehabilitative to the offender (Probation Officer Reddick, 1992).

There is no clear evidence as to how long scarlet letter special probation conditions have been used, how many offenders have been required to comply with such sanctions, or what class of offenders are being sentenced to this type of alternative probation condition. However, since 1976, offenders have been required to make public apologies, post signs on their residences and vehicles, place stickers on car bumpers or windshields, and wear t-shirts stating their crimes and convictions.

Between 1976 and 1991, scarlet letter-type dispositions sanctioned as special probation conditions have included sentencing convicted offenders to public humiliation

by shame and embarrassment. Examples are: a purse snatcher in California was sentenced to wear dance tap shoes whenever he left his house so he could not sneak up on his victims (People v. McDowell 59 Cal. App. 3d 807 (1976). The reason behind this sanction was to embarrass the offender and allow potential victims to hear him coming.

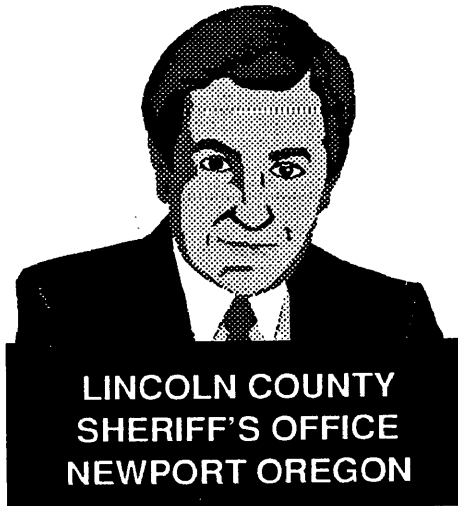
In 1982 and again in 1984 two offenders were required to comply to forms of scarlet letter probationary punishments. In May, 1982, the convicted offender was required to write a confessional letter to the editor of his local newspaper (4 National Law Journal: 55). Again in Feb., 1984, another convicted offender had to stand before his church congregation on Sunday and confess his crime (6 National Law Journal: 47).

Judges in six states² continue to require offenders to submit to special probation conditions that favor scarlet letter dispositions as punishment by humiliation. For example, in Oregon, between 1986 and 1989 approximately twelve repeat offenders were required to run advertisements in their local newspapers of their own choosing and expense. The ads consisted of the offenders photograph, identity, a description of the crime committed, the probation conditions, and the apology (see Figure 1) (Reddick, Probation Officer, 1992; Brilliant, 1989: 1357-1385).

In 1987, an Oregon judge sentenced Richard Bateman, a convicted child molester, to post signs on his house doors and automobiles that read: "DANGEROUS SEX

²California, Oregon, Texas, Florida, Oklahoma, and Illinois. Nebraska has used public apologies at least one time.

CRIMINAL'S APOLOGY



Thomas E. Kirby was convicted of Burglary First Degree for burglarizing a residence in South Beach, Oregon October 25, 1985. He has previously been convicted of burglary in Portland. He was placed on probation to the Corrections Division on March 7, 1986 and ordered to make restitution, pay a fine, perform community service and place this ad in the Newport News-Times apologizing for his conduct. At the time of his arrest, he was in a residence on Sam Creek Road in the Toledo/Newport area. Prior to this he resided in Waldport.

APOLOGY

I, Tom Kirby, wish to apologize to the people of the City of Newport for all of the problems I have caused. I know now what I did was selfish and wrong. I also realize that I have caused a lot of hardships on people that were my friends and also my own family.

I want to thank the courts for a second chance to prove I can be an honest upstanding person.

My apologies again for causing any inconveniences to anyone.

Tom Kirby

CRIME STOPPERS TIP: As the jails and penitentiaries fill up and criminals remain in the community, be aware of which of your neighbors pose a threat to you and your family. Don't hesitate to call a person's probation officer or the police if you observe any suspicious activity on their part. Be aware of who has been convicted of crimes and who may be committing crimes in your neighborhood.

Figure 1

OFFENDER: NO CHILDREN ALLOWED" (State v. Bateman 771 P. 2d 314 (Or. App. 1989). Bateman was sentenced to five years probation with nine standard conditions plus this scarlet letter condition. According to Diane Alessi of the Oregon Public Defender's Office, Bateman was the first person ever in Oregon to receive this type of sanction. The judge imposed the condition to draw attention to what she perceived a major problem with Oregon's prison system: the "too-early" release of offenders. Most offenders, like Bateman, would spend less than five years in prison for approximately a 10-15 year sentence. The judge, therefore, wanted to ensure Bateman would spend more time in prison, so she fashioned these onerous conditions knowing Bateman would be unable to comply (Alessi, 1991). In this case the judge believed that the signs were necessary to inform the community that dangerous people, such as Bateman, live in a metropolitan area, and it might help protect the children and help him "face the facts" (Alessi, 1991).

Richard Fowlks, the trial court attorney for Bateman, indicated that Bateman appealed the condition of his probation. However, his probation was revoked pending appeal for failing to comply with the sign requirement, living within a 10-block radius of his previous residence, frequenting public places where children gathered, and for not entering a sex-offender and alcohol treatment program. Revocation was further justified by his absconding from his residence when he learned the probation officer was looking for him. According to Mr. Fowlks, Bateman was released from custody in November, 1990 (1991).

Recently, Judge Lykos of Harris County District Court, Texas sentenced a grandfather who sexually molested his grandchild to probation with the condition that he post a sign on his front door which read: "**NO CHILDREN UNDER THE AGE OF 16 ALLOWED.**" Judge Lykos believed this man was too old and too physically ill to be incarcerated, but she had to do something to punish him. Because of his illnesses and need for medical treatment, she thought that the Texas Department of Correction would put him on parole. Instead she created a probation condition that not only punished but warned society of a threat (Lykos, 1992: Interview).

In 1989, Judge Rouse in Columbus, Nebraska required a public apology through all media sources by a woman who falsely accused a man of rape (Unpublished Opinion, Nitsche v. Reiber, et al, 1989). According to G.L. Kuchel³ (1992), who testified as an expert witness in this case, the apology had to be approved by the court and the plaintiff prior to broadcast or publication. Judge Rouse formulated this public apology to serve as a deterrent to false accusers.

Another case, less impacting to community protection than the sex offender or rape cases, occurred in October, 1989 in Palatka, Florida when four men who allegedly stole crabs from traps were ordered to spend four Saturdays walking up and down a bridge wearing signs like sandwich boards that read: "**MOLESTING CRAB FLATS IS A FELONY: I KNOW BECAUSE I MOLESTED ONE.**" These men agreed to the

³G.L. Kuchel is a Professor of Criminal Justice at the University of Nebraska, Omaha.

public humiliation rather than be sentenced to a period of imprisonment (Brilliant, 1989: 1370). In this case, the sentence appeared to be the best solution for both the convicted offenders and the public. It was less harsh than that of Bateman's and less costly to the victims and the overall public. The difference between these extremes of punishment is the humiliation factor; the public attitude is much more negative to a sex offender in the neighborhood than it is to having a crab thief.

Another example of conditions designed as so-called scarlet letters is bumper or windshield stickers for convicted drunk drivers. The current movement against drinking and driving was the force behind the creation of red stickers which state: "**CONVICTED DUI-RESTRICTED LICENSE**" or "**DUI OFFENDER ON PROBATION.**" These stickers were designed to do two things: embarrass the perpetrator (scarlet letter humiliation) and warn the public. In some states the bumper sticker can be covered over with a velcro strip when someone other than the offender is driving the car; but, in others they are permanently affixed to the vehicle regardless of who operates the vehicle.⁴

According to Pat McCabe, Director of the Salvation Army Department of Corrections in Sarasota, Florida, these scarlet letter stickers began with Judges Rick DeFuria and Becky Titus during the period 1983-1986 when there was an intensive effort to educate the public about driving and drinking. Florida state statutes require automatic

⁴Florida, Oklahoma, Washington, Virginia, Ohio, Michigan, and Texas

suspension of drivers licenses for convicted first-time drunk driving offenders and attendance in a substance abuse course.⁵ Therefore, the bumper sticker is used as a granted privilege for business purposes only. That is, the defendants are placed on probation with the special condition that the bumper sticker be placed on the car for the purpose of going to work, church, school, and the probation office. This condition is given as an option to the offender, but once accepted it is binding. Initially, the sticker was resisted and the Corrections Department was inundated with complaints from offenders, wives, business owners and employees. There was also a great deal of concern that it would cause local authorities to harass these people; however, that never materialized. As the bumper sticker became more common and more acceptable, probationers began to recognize its merit. Also, "because of national recognition by the public and the media, the bumper sticker lent itself to recognition and acceptance" (McCabe, 1991: Interview).

During 1985 and 1986 approximately 250-300 people were placed on probation with bumper sticker conditions in Sarasota County, Florida by Judge Titus and Judge DeFuria. Between 1986 and 1990, Judge Titus moved up to the State Court of Appeal and Judge DeFuria retired. In 1990, one person in Brevard County, Florida was sentenced to probation with the sticker condition. In February 1991, Judge DeFuria came back to the bench briefly and imposed the bumper sticker on approximately six additional

⁵Section 316.193(4)(a) of the Florida Statutes provides that a court must require a convicted drunken driver to attend a substance abuse course.

people (McCabe, 1991). Florida has not evaluated the success of this disposition; however, the anecdotal data suggests that probationers fear revocation for non compliance of scarlet letter conditions (McCabe, 1991).

In Oklahoma, the sticker is part of the standard plea agreement between the offender and the district attorney (Connally, 1988: 531). The sticker, which reads, **"PROBATIONARY DRUNK DRIVER" or "I AM A CONVICTED DWI/DUI DRIVER IN MIDWEST CITY MUNICIPAL COURT. Report Any Erratic Driving To Midwest City Police,"** is affixed to the inside rear window of the vehicle regularly used by the probationer. For a single car family, where non-probationary persons must drive, the sticker must remain unimpeded from others' view. If the probationer successfully complies with and completes the sticker requirement the conviction is stricken from the driver's record (Connally, fn 13, 1988: 531).

Also, the State of Iowa enacted legislation on July 1, 1991, requiring third-time and subsequent drunk drivers to surrender their auto registration and license plates. (See Appendix A). The only way drunk driver convicted offenders can get their plates back is to agree to accept special "scarlet letter" plates (Iowa Department of Transportation, 1991). Each plate will be alpha-characterized with a "Z" as the first and second letter on the plate. These plates are designed for both privately owned and commercially owned vehicles (the first "Z" represents private vehicles; whereas, the second represents commercial vehicles (see example in Appendix A). The plates must be applied for and acceptance constitutes consent. If these plates or this new legislation has any effectiveness

toward deterring drinking and driving, it may only be to law enforcement agencies who, seeing a "Z" plate, may stop the vehicle without any other "probable cause" and administer a sobriety test. Nevertheless, the plates could be considered a "scarlet letter" because the public has been informed of such legislation through the media. As the general public drives on Iowa's streets and highways, seeing a "Z" license plate can connote punishment. To date, no one has applied for these special "scarlet letter" plates, which might be due to the public humiliation factor perceived by those convicted offenders who want to drive (Iowa Department of Transportation, 1991).

Further use of the bumper sticker as punishment is seen in the 1987 court decisions to penalize corporations. For example, Vaughn and Sons, a corporate truck company was once required to display a scarlet letter-type sign on all of its trucks that either read: **"KILLER CORPORATION"** or **"BEWARE--CAUTION: THIS CORPORATION HAS BEEN FOUND GUILTY OF KILLING ANOTHER HUMAN BEING"** (737 SW 2d, 805-815, 1987). In this case, the Texas Statute §1251(d) expressly authorizes a trial judge to assess "scarlet letter" type punishments in addition to any fine assessed.⁶ As the court noted in United States v. William Anderson Co. (698 F. 2d 911 (8th Cir. 1983), painful publicity is not relished by corporate tycoons. Public opinion can be sharply focused on culprits engaged in anti-social, anti-competitive conduct by means of "creative" sentencing.

⁶§1251(d) provides: in addition to any sentence that may be imposed by this section, a corporation has been adjudged guilty of an offense may be ordered by the court to give notice of the conviction to any person the court deems appropriate.

More recently Judge Broadman of California gave a beer thief a chance to avoid prison by requiring the offender to wear a T-shirt stating: "**MY RECORD AND TWO SIX PACKS EQUAL FOUR YEARS**" on the front and "**I'M ON FELONY PROBATION FOR THEFT**" on the back (see Figure 2). The offender, with a prior record, could have been sentenced to a maximum of four years at a cost to the California taxpayers of approximately \$80,000.00. Judge Broadman stated: "I don't think it is appropriate to spend \$80,000.00 on this guy." Instead, Broadman spent \$20.00 of his own money to buy the offender the T-shirt (Broadman, 1991: Interview).

A review of media sources indicates public apology and bumper sticker sentences are the most frequently used form of scarlet letter punishment. The convicted offenders must report to the probation office showing the bumper or windshield stickers affixed or wearing the T-shirt; otherwise, probation is revoked and the convicted offender is incarcerated. These scarlet letter probation conditions may exemplify that the threat of public exposure, through punishment according to what society considers acceptable, and what some inmates perceive as more severe than imprisonment itself, could accentuate crime prevention.

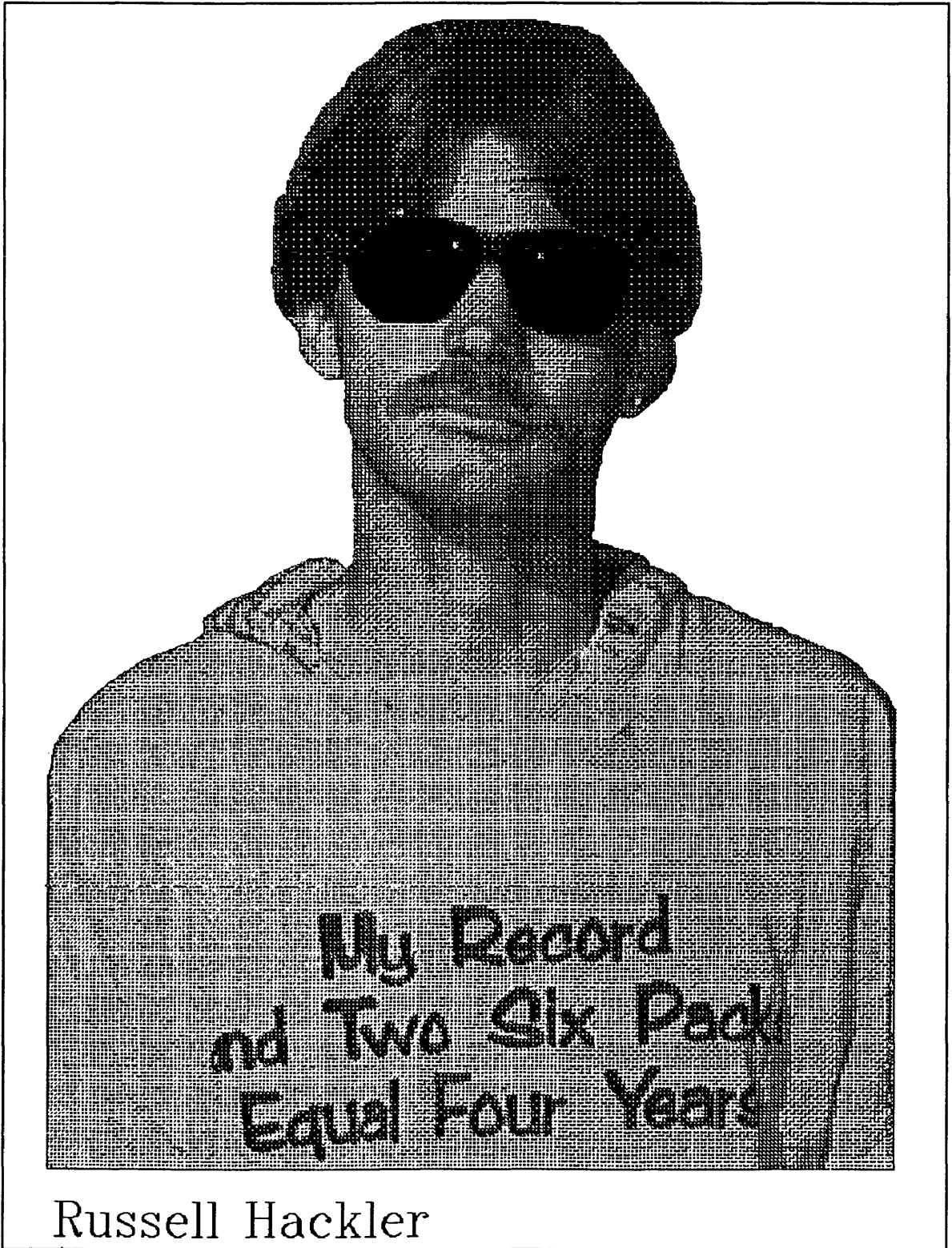


Figure 2

CHAPTER III

SOCIETAL AND INMATE ATTITUDES TOWARD CRIME AND PUNISHMENT

The criminal justice system accentuates crime prevention through punishing offensive behavior according to what society considers acceptable goals of punishment (specific and general deterrence, rehabilitation, education, incapacitation, and retribution). General deterrence theory suggests that law abiding citizens conform to the laws by the threat of penalties, "that only severe penalties can deter" (Zimring, 1973: 32). The question is: is it acceptable and effective to punish by humiliation or should we just incarcerate people who engage in offensive behavior?

THE THREAT OF PUBLIC EXPOSURE

Criminal law has progressed full circle by accepting retribution and punishment as primary elements in correctional efforts, and the increased use of probation has prompted much debate between supporters and those contending society will no longer be free and protected. However, legal rules and decisions must affect the action of those toward whom they are directed: the public (Tyler, 1990: 19).

Miller and Anderson (1986: 418) contend that social relations (friends, family, and peers) that reflect the influence of other people's judgments (normative values reflect a person's own ethical views) may be instrumental in explaining the deterrence doctrine that "most individuals prefer to avoid prison and are discouraged from engaging in criminal behavior because threat of punishment deters most individuals." However, there

are related problems facing decision-makers and the criminal justice system: What conditions are likely to deter? Are deterrence doctrines based on individual perceptions of the threat of public exposure significant to the involvement of illegal behavior? Is the threat of punishment by public exposure, threat of social disapproval from peers, and personal moral commitment likely to inhibit criminal behavior (Grasmick and Green, 1980: 325)? Internalization of norms, fear of informal sanctions from peers, and fear of physical or material legal punishment may be necessary to explain deterrence theories. The threat of humiliation from public exposure as an offender to one's peers may have a real deterrent affect.

The threat of humiliation from public exposure may not be a factor of punishment to the career criminal. However, public opinion that offenders should get their "just deserts" increases the aims to deter, reform, and protect the public (Walker, 1991: 8). Moral, social, and punitive threats of public exposure suggests that sufficient deterrence is defined as maximizing the number of people who are deterred from some type of criminal behavior (Walker, 1991:8). Therefore, scarlet letter dispositions, as a general deterrent, may be morally, ethically, and socially acceptable forms of punishment aimed at discouraging criminal conduct by inflicting public humiliation. Legal sanctions that allow offenders to express regret, such as public apologies, will likely convince the public that social, ethical, and psychological problems are considered in order to reduce the crime rate and criminal activity.

Sociological, Ethical, and Psychological Considerations

The legitimacy of legal sanctions focuses on personal gain and social group incentives to obey the law through social control and social reaction influences. Social group influences can be instrumental in whether individuals choose to commit a crime. As the Classical criminologist Beccaria suggested, people have a free will to choose either to commit a crime or to remain law-abiding (Vold and Bernard, 1986: 362).

Ethically, if a punishment designed to deter or threaten potential offenders is not followed through, it will not be believable to the public (Zimring, 1973: 35). Therefore, if scarlet letter sentences are designed to deter, reform, and protect they must stimulate acceptance of and respect for the judicial system and not be perceived by the public as only ethical and moral commitments to reduce criminal behavior. However, there may be no correlation between an individual's moral evaluation of a particular type of behavior and the social undesirability of that behavior. For example, drunk driving may not be perceived by the perpetrator as a morally wrongful behavior since he may not believe himself to be drunk and therefore dangerous to himself and others, but, society may discern it to be highly objectionable. Thus, without certainty of punishment, the public's attitude toward fairness and acceptability may hinder the use of scarlet letter dispositions because they are often seen as lenient especially for drunk driving offenses.

On the other hand, "according to the Kantian principle, the offender is a citizen, and the community's decisional process exists to protect his welfare as well as that of others" (Zimring, 1973: 42). Insofar as attempting to make individuals more aware and

more sensitive to future punishment, the use of such pillorying probation sanctions must be seen as stigmatizing, humiliating and embarrassing, changing offenders attitude toward threatened consequences, society, and their ability to be law-abiding citizens (Zimring, 1973: 226).

Discovery of an individual's commission of a crime by the public can change the community standing for that person because social feelings about the crime will result in social judgments. As such, punishment of a crime by public awareness may carry significant social reprobation. "The fact that social standing is injured by punishment and the danger of exclusion from the group" are strong elements in the threat of punishment, the convicted offender is then subjected to rejection and contempt of society (Zimring, 1973: 190). Stigmatization may attach the thought of being shamed when caught, convicted, and punished in a way that communicates both moral and legal threats of punishment that may serve as a deterrent to crime.

This possibility has long been recognized and acted upon in the form of what Bentham refers to as "punishment of infamy and ignominious punishments." The ducking stool, the stocks and the pillory were used to reduce the status of the offender (Zimring, 1973: 191).

The publication of the identity of guilty offenders was specifically designed to degrade, shame and embarrass, and bring down the "wrath of society" on convicted offenders (Zimring, 1973: 192). Some evidence of this ideology may be seen in the aforementioned scarlet letter dispositions designed to punish the convicted offender, to warn and educate the public, and to make the public aware that criminal laws are

enforced, thereby encouraging citizens to police their own activities. In addition, scarlet letter dispositions may lead to an increased awareness of the reality of punishment, strengthening a fear of the law.

On the other hand, "once a person has lost a considerable amount of standing in the community, he will have less to fear from a new conviction since his reputation is already tarnished" (Zimring, 1973: 227). Moreover, stigmatization will cause an individual to react defensively, rejecting the values of the group that criticizes him (Zimring, 1973: 227).

Many of the changes that actual punishment can produce may not directly relate to the effects of threats of punishment on future behavior. Although not supported by empirical evidence, some legal writers have suggested that scarlet letter dispositions may be a form of punishment that restrains offenders without posing a large economic burden on the public, while also providing safety to the community and accentuating the level of respect for legal authority (Kelley, 1989: 783). In contrast, if punishment is excessive, and "makes no measurable contribution" to acceptable goals, then it is only for the purpose of inflicting needless pain and suffering (Kelley, 1989: 778). From a legal reasoning perspective, scarlet letter punishments of the past may have served a specific deterrence for the offender.

However, as a general deterrent, today's scarlet letter sentences are aimed at discouraging any criminal conduct not only by convicted offenders but by society in general. These sentencing dispositions provide such a deterrence because when scarlet

letter "signs" of punishment attached to convicted persons are seen, other people become aware that those crimes are punishable and the stigmatizing effect attached to criminal behavior is felt by those that consider committing crimes. Again, from a legal reasoning standpoint, "The deterrent effect of punishment is heightened if it inflicts disgrace and indignity in a dramatic and spectacular manner" (United States v. William Anderson Co. 698 F.2d 911, 913 (8th Cir. 1983)). Following this legal line of reasoning, it would seem that the scarlet letter sentence serves to remind the public about the consequences of criminal conduct. In Florida, for instance, the bumper sticker is used as a general deterrent because the deterrence came from the public and media attention, not the sticker itself (McCabe, 1991).

Unless the punishment fits the offender (e.g., the drunk driver) rather than the offense (i.e., drunk driving), rehabilitation may not occur. The scarlet letter disposition is a constant reminder of the unacceptability of the offending behavior. As the court stated in Goldschmitt v. State: "This bumper sticker may make you angry. It may subject you to some humiliation, but while you have to display it, hopefully you will be learning...you are not supposed to drink in excess and drive a vehicle" (490 So. 2d 123, 126, Fla. Dist. Ct. App. 1986). The convicted offender and anyone contemplating a criminal act might be deterred by the use of scarlet letter punishments in the community since they serve as a reminder of the illegality of the offense. However, offenders may consider that the scarlet letter sentencing dispositions are a fad rather than punishment. There is no empirical data about the offenders perception of special probation conditions;

however, Petersilia has studied offenders perceptions of strict probation conditions (i.e., ISP).

Convicted Offender Perceptions of Prison vs. Probation

Many convicted offenders seem to prefer a short term in prison over being released to a community-corrections program (Petersilia, 1990: 22-27). If given the option to serve prison terms or participate in a community-based program, some offenders will choose prison because community-based punishments may be perceived as more severe than incarceration. In New Jersey, fifteen percent of offenders who originally applied for an Intensive Supervision Program (ISP) changed their minds once they understood the requirements: being visited by a probation officer three times a week, telephoning the probation office on alternate days, unannounced house searches, urine tests for drugs and alcohol, and performing community service. In addition, the probationer was required to be employed, participate in training or education programs, and receive counseling in treatment programs. (Petersilia, 1990: 23).

In Marion County, Oregon, convicted non-violent offenders were asked whether they would serve their sentences on ISP rather than go to prison (Petersilia, 1990: 24). After the completion of one-year on ISP, approximately one-third of these offenders said that a sentence of two to four years in prison was less punishing than two years in the community under ISP sanctions (Petersilia, 1990: 25).

The length of time an offender can actually serve may further reduce the fear of being incarcerated. Inmates know they are likely to be early-released because of prison

"caps." In Texas, California, and Illinois, for example, inmates sentenced to two-to-three years actually only serve about six months. In Oregon, a five year sentence is reduced to three-to-four months of actual time served (Petersilia, 1990: 25). In Texas's Harris County system consequences for criminal conduct are limited. Inmates serve one month for every year of conviction. The system has broken down because legislation does not expand the penal system, "community-based programs may be misinterpreted, and there are no funds for alternative sentencing." Furthermore, "jail inmates inform the public that incarceration is no 'big deal' anymore and no one is afraid of doing jail time because of the early-release system" (Lykos, 1992).

"By definition, imprisonment limits freedom of movement and activity, but once a person is in his own community, curfew and other restrictions may seem harder to take. Offenders on the street seem to be aware of this, so it is plausible that imprisonment is no longer considered to be severe punishment" (Petersilia, 1990: 23); whereas, a community-based sanction is more restrictive and has no opportunity for early-release to the offenders. If this is so, then offenders' perceptions should be considered in structuring special probation conditions and in making sentencing decisions. No legal action can be perceived as punitive and deterring if it does not seem punishing to the convicted offender. Through the legal context, in which judges use discretionary scarlet letter dispositions, society might convince policymakers that there are "other means" to extract punishment and satisfy the public's desire to be protected.

CHAPTER IV

THE LEGAL CONTEXT OF JUDICIAL DISCRETION AND THE USE OF SCARLET LETTER DISPOSITIONS

It has long been recognized that judges impose disparate sentences that could be attributed to their contrasting preferences on the purpose of criminal law (Myers and Talarico, 1987; Tavill, 1988; Brilliant, 1989; Kelley, 1989; and Lykos, 1992). It appears that judges are placing greater emphasis on a variety of alternatives and sentencing decisions designed to correspond with public opinion and attempts to reshape offenders' criminal behavior. However, punishments are arbitrary and excessive when judges use broad discretion in determining what is in the best interest of convicted offenders and society as a whole (Myers and Talarico, 1987: 2-3).

Judicially disparate sentences might be the result of judges with retributivist leanings paying particular attention to the severity of the offense; whereas, those concerned with incapacitation might focus on offenders' risks of recidivism (Myers and Talarico, 1987: 2-5). "Theory holds that judges and all political authorities seek primarily to influence and reinforce existing social, political, and economic orders" (Myers and Talarico, 1987: 3). In essence, what judges do and what they prefer to do can be attributed to individual identification with retribution, deterrence, or rehabilitation and reformation of convicted offenders not necessarily characterized as dangerous to society. Recent judicial discretion to use scarlet letter sentencing may focus on these characteristics while being inclined to draw a general lesson for society and to penalize

offenders in order to reshape their future behavior. As argued by Myers and Talarico (1987: 5), judicial discretion and actual sanction preference is difficult to identify because judicial preferences are often indirectly exercised and influenced by what judges prefer to do. For example, placing a drunk driver back into the community with bumper sticker requirements is aimed at letting the public know there are sanctions against driving and drinking. This action substantiates that judicial philosophies are not confined to precedent or to the intentions of the founding fathers or legislative framers.

Moreover, if public opinion corresponds with sanctioning individuals to punishment that lies within the best interest of society and results in encouraging the public to police their own activities, then scarlet letter dispositions might integrate the courts and the extra legal environment that is germane to societal expectations of what selected criminal justice policies, indirectly or directly, aim to accomplish.

Constitutionality: Judicial Reviewability

Probation conditions such as requiring a sex offender to place a sign in his yard that identifies him as a child molester may constitute cruel and unusual punishment, restrict other First, Fourth, and Fourteenth Amendment rights, and compel offenders to comply with arbitrary and capricious punishments. Significantly, few have challenged these probation conditions, and those that are challenged have gone only as far as state courts of appeal and been upheld (Tavill, 1988: 624).

Courts have not addressed the Constitutionality of imposed probation conditions (Tavill, 1988: 624-625). Rather, they have employed a reasonableness test. If the

condition is reasonably related to the crime committed and will deter future criminality, it will be upheld even if it encroaches on a Constitutional liberty. Therefore, Constitutional arguments may or may not persuade a court to invalidate a reasonable condition.

Courts do appear to achieve a proper mixture of rehabilitative goals with those of punishment when imposing scarlet letter conditions on defendants. For example, Judge Lykos attempts to force responsibility on convicted offenders and off the taxpayers when she imposes special probation conditions (Lykos, 1992). However, opponents of scarlet letter conditions contend that these modern probation conditions should be subject to Eighth Amendment analysis and struck down as cruel and unusual punishment. Jon Brilliant (1989) advocates that scarlet letter probation conditions impose punishment by humiliation and may hamper the rehabilitation goal of probation. Because of the humiliation, these conditions contain punitive elements and should be analyzed for conformity with the Eighth Amendment. He contends that the prohibition of cruel and unusual punishment is a "flexible tool for protecting the values underlying the Eighth Amendment language" (Brilliant, 1989: 1381). This meaning was developed in Trop v. Dulles (1957), stating that whether a punishment is cruel and unusual must be drawn from "the evaluating standards of [human] decency that mark the progress of a maturing society" (Brilliant, 1989: 1381). This standard leads to his conclusion that certain scarlet letter conditions can be struck down because the underlying basic concept of the Eighth Amendment is the dignity of mankind (Brilliant, 1989: 1382).

In a recent survey, one judge in Nebraska's 4th Judicial District indicated that scarlet letter dispositions are fraught with overtones of cruel and unusual punishment as opposed to rehabilitation (c.f Chapter VI). Any scarlet letter punishment may infringe upon First Amendment rights such as the implied freedom of association. Requiring signs on residences or cars may deprive defendants from being allowed to join groups to improve their moral or ethical standards. The result of scarlet letter dispositions, then, may be no protection of this important civil right (Tavill, 1988: 626-27). Scarlet letters also might deprive a person of the right to privacy as it may infringe upon family life and personal relationships. Scarlet letter sentencing can decrease the capability of convicted offenders to retain employment or to find suitable work. Furthermore, requiring signs to be posted on doors of private homes is allowing the government to make public use of personally owned property which is a protected right (Tavill, 1988: 629).

The flexible standard of cruel and unusual punishment incorporates the idea that society is more civilized today and as it has evolved since the days of Hester Prynne, so has the method of punishment. Likewise, probation conditions should not be sanctioned if they deprive a person of his dignity by subjecting him to public ridicule. Therefore, the Court should strike down, as cruel and unusual, a condition such as requiring a child molester to place a sign on his residence and automobile. Judges should respect the purpose of probation by imposing conditions that rehabilitate and the Eighth Amendment supplies the framework within which to maximize that result (Brilliant, 1989: 1382).

Conversely, the courts are not inactive in deciding Constitutional issues that might constitute cruel and unusual punishment or that deprive a probationer of protected liberties. It is the Supreme Court that has not heard the issues--to date, no one has ever taken a case to the Court.

However, between 1988 and 1990, six cases on issues of probationary conditions were heard and either upheld or struck down by state courts of appeal (Criminal Law Reporter, 1989 & 1990). Briefly, the courts have upheld the condition that convicted drug dealers can be banished from a home county because the banishment is reasonably related to protecting the public and to defendants' rehabilitation (U.S. v. Cothran (Sep. 19, 1988). Illinois struck down a public apology requirement for a convicted first-time drunk driver, calling the conditions "far more drastic" than the Illinois statute allows and furthermore, it "possibly adds public ridicule as a condition which could have a psychological effect on the defendant" and "certainly be inconsistent with rehabilitation" (People v. Johnson Ill. App. Ct. 4th Dist. (Sep. 22, 1988). This is certainly opposite to the attitude of Florida courts where the drunk driver bumper sticker for convicted first-time offenders has been upheld. In addition, the California Supreme Court has upheld public apologies for thieves and burglars.

Trial court judges and probation officers support higher state courts upholding scarlet letter conditions that are required of probationers such as Bateman and Goldschmitt. These proponents argue that although these conditions may conflict with Constitutional rights and liberties, a probationer's status is conditional. Scarlet letter

conditions, then, may satisfy the reasonableness test in that they relate to the crime committed. Scarlet letters do not relate to or prohibit the defendants from engaging in any non-criminal activity and may foster deterrence against committing future criminality (Tavill, 1988: 624).

If probation conditions diminish Constitutionally protected rights, it might be due to the fact that probationers rights are already limited because their status is conditional (Tavill, 1988: 625). Probationers are convicted criminals at liberty because of the legislatures' and the courts' leniency. Unless the terms of probation are needlessly or viciously violative of Constitutional rights, they will most likely be upheld (Tavill, 1988: 625). However, there is a problem; the courts fail to recognize that when scarlet letter probation conditions impose punishment, they may be arbitrary or excessive in relation to probation goals.

According to Rosalind Kelley (1989), unique sentences are not necessarily arbitrary in relation to the offense committed. Arbitrariness is assessed on a case-by-case basis (Kelley: 776). "Merely because a probation condition is out of the ordinary does not make it Constitutionally unreasonable. As long as the punishment is potentially available to all similar offenders, it is not arbitrary punishment" (People v. McDowell, 1976: 810). For example, imposing sign requirements, as the Oregon District Court did

on Bateman, is not arbitrary under Oregon law which provides for broad discretion to allow for sentences that are both appropriate and in the best interest of society.⁷

The general idea of imposing probation on any offender is to reform and control his conduct from future criminal behavior. Thus, the general rule is that the condition will be reasonably related to the offender's rehabilitation and to the protection of the public. Courts have, with discretion, used differing interpretations of the term "reasonably related," but in United States v. Consuelo-Gonzalez (1975), the Court stated: "to determine whether a reasonable relationship exists, consideration must be given to the purposes sought to be served by probation...To achieve a permissible objective without restricting probationer's lawful activities, Constitutional limitations should be narrowly drawn so that the infringement serves the broad purpose of the Federal Probation Act of 1964." Judges use of some type of scarlet letter probation condition does fall within the scope and purpose of the Federal Probation Act. There are advantages and disadvantages of utilizing such sanctions to punish criminal offenders.

⁷Sentencing conditions in Oregon only need to be related to the offense or to the needs of an effective probation: see Kelley, fn 71, pg. 777.

CHAPTER V

ARGUMENTS FOR AND AGAINST SCARLET LETTER DISPOSITIONS

ADVANTAGES OF USING SCARLET LETTER DISPOSITIONS

According to Blodges (1987) many have praised the creative efforts made by judges to devise alternative sentencing dispositions in lieu of incarceration. Scarlet letter sentencing dispositions may prove useful in a system struggling to find the proper mix between punishment and rehabilitation (Brilliant, 1989: 1357). They are different than those used in the Seventeenth Century in that Seventeenth Century scarlet letter dispositions were designed to humiliate or draw public ridicule. The primary purpose of today's scarlet letter dispositions is to protect potential victims by warning them of the dangers the offenders pose and deter potential criminals from offending. Additionally, providing an offender with an alternative that does not create extreme punishment may serve as the rehabilitative goal of probation. Scarlet letter sentencing dispositions are the least restrictive and least severe alternative to incarceration allowable under the law (Kelley, 1989:93). They are acceptable to society because they provide a public service and are economically feasible (Kelley, 1989: 93).

In most cases, once an offender is locked up, the crime goes unnoticed; but, with scarlet letter sanctions, the public is both informed and warned without unnecessary burdens placed on anyone (McCabe, 1991). Nationally it costs approximately \$20,000.00 a year to maintain one inmate in prison; whereas, alternative sentences reduce these costs

approximately 18-20 percent (Blodges, 1987: 32). Some punishments, such as public apologies and bumper stickers, go even further and cost the community nothing. These probation requirements place no burden on the offender-probationer because it is an optional condition or a plea negotiation that the convicted offender can request at the time of sentencing. Both the public apologies and the bumper stickers are economical to the public because the offender incurs the cost. The Corrections system pays nothing; the public pays nothing (Reddick, Probation Officer, 1992). These sentences appear to be a good idea, appear to work effectively, and perhaps more judges should utilize them (McCabe, 1991). They make sense at a time when crime rates are high, prisons and jails are overloaded, and public attitudes cry out for protection and retribution (Kelley, 1989: 775-788).

DISADVANTAGES AND PROBLEMS OF SCARLET LETTER DISPOSITIONS

The American Civil Liberties Union (ACLU) and some defense attorneys contend that scarlet letter alternatives may be more punitive and more ineffective than the traditional standard probation conditions or incarceration. For example, Rhode Island's ACLU argues that this form of punishment is simply inappropriate because it focuses on shame and humiliation (Brilliant, 1989: 1368). Oregon's ACLU argues that offending individuals are deprived of their civil liberties when required to publicly apologize in newspapers (Reddick, Probation Officer, 1992).

The Right Of Society To Be Protected

The ACLU argues that scarlet letter dispositions as special probation conditions are a needless and ineffective imposition of suffering because they are not protecting the class of persons for which they are intended, such as children in a sexual molestation case; whereas, allowing drunk drivers to regain their drivers licenses defeats the purpose of protecting the public from the danger they cause on this nation's highways (Kelley, 1989: 784-785).

Society has a right to be protected from imminent harm or danger. This justifies identifying and controlling anyone who poses a threat to society. It can be argued that scarlet letter dispositions are more punitive than incarceration itself. As noted by Petersilia, community-based sanctions are most likely to deter if social standing is injured by punishment and the individual feels danger from exclusion (Petersilia, 1990: 24). Imprisonment does not effect either attribute for repeat criminals. Inmates with prior convictions are early-released with either parole restrictions or total freedom without stipulations or special requirements attached as conditions.

Early release due to overcrowded conditions or reductions in time served for good behavior accounted for 419,783 departures from state prisons during 1990 (Jankowski, 1991: 1-8). Table 1 shows that the median sentence for "all offenses" was 58 months, while the actual time served was approximately 22 months. Moreover, sexual assaults (excluding rape), burglary and public order offenders all served less time then required

TABLE 1. MEAN TIME SERVED (BY MONTH IN 36 STATES)		
OFFENSE	MINIMUM ^a AND MAXIMUM ^b LENGTH OF SENTENCE ^c	ACTUAL TIME SERVED ^c
ALL OFFENSES	32.4 - 82.9	21.5
SEXUAL ASSAULT ^d	32.8 - 93.9	27.6
BURGLARY	32.0 - 82.2	19.9
PUBLIC ORDER (DWI/DUI)	15.3 - 38.5	11.3
^a Minimum mean time served is the jurisdiction's estimate of the shortest time that each admitted prisoner must serve before becoming eligible for release. ^b Maximum mean sentence length refers to the maximum sentence that an offender may be required to serve for the most serious offense. ^c Excludes sentences of life without parole, life plus additional years, or life and death sentences. ^d Excludes Rape.		
BJS Sourcebook, 1990		

by law. However, convicted offenders sentenced to probation must comply with the actual probation period without early release. To some then, imprisonment may appear to be less punitive than community sanctions as punishment.

In Joan Petersilia's study, *When Probation Becomes More Dreaded than Prison* (1990), she feels that possessing a prison record no longer has a stigmatizing effect because so many of the new offenders have peers or other family members that have done time. The stigma attached to a prison record appears to no longer have the serious effect on remaining a law-abiding citizen as it once did (Petersilia, 1990:24). In fact, imprisonment confers status in some neighborhoods, particularly for gang-affiliated and career criminals. That is, a prison term often can enhance community status when the

offender returns to his neighborhood, especially in inner cities (Petersilia, 1990: 24). Gang members repeatedly stated that they do not fear imprisonment because it is no longer a threat. "In California's study of gangs and drugs, gang members repeatedly stated that incarceration was not a threat because they know their sentences would be minimal. Some even consider the short term of detention a 'badge of courage,' something to brag about when they return to the streets" (Petersilia, 1990:24).

One of the arguments made by Richard Bateman's attorney was that the requirement to post the signs would effect his opportunity to find a job and make him even more anti-social (Silverman, 1987: 8). In contrast, a prison record has increasingly less effect since employment opportunities in general have decreased. Therefore, if Bateman was required to post the sign today, the employment factor may not be relevant, but the social isolation he might feel may cause him to become more anti-social.

Social isolation is another aspect of presumably punitive imprisonment and community sanctions. In prison, an inmate is perceived by the public to be isolated from the kinds of people he would be around out in the community. However, for today's inmates that is not the case; it is likely that newly admitted inmates will find friends and family already there (Petersilia, 1990: 24-25). For the convicted offenders sentenced to community-based sanctions, social isolation is more likely to occur because the public will exclude these offenders from the group. For example, in Bateman's case, the signs could alienate him from society and increase his perception of the severity of the punishment, which can result in more anti-social behavior (Silverman, 1987: 8).

Furthermore, any community sanction may stress and isolate offenders more than imprisonment because offenders cannot "return to their old lives" since community sanctions transform their lives drastically (Petersilia, 1990: 25).

Alessi and Fowlks (1991) both argue that the sign requirements only make an offender a potential victim of others and any shame felt may not be an effective rehabilitative tool. Furthermore, psychiatrists suggest that these sanctions do not promote treatment and rehabilitation because they do not assist offenders, such as Bateman, in learning how to interact socially with adults. It was reported that the psychologist in Bateman's case contends that sex offenders are sick people and require psychotherapy rather than punishment by humiliation (Alessi, 1991). As a result, without treatment it is likely Bateman and others like him will recidivate again and again.

Further arguments against the use of scarlet letter dispositions in court sentencing stem from defense attorneys' rationale that it would be better to be incarcerated than to be more harshly punished by public humiliation. Some argue that these alternatives often result in ineffective deterrence and only exemplify judicial leniency toward those who should receive their just deserts (Fowlks, Personal Correspondence, 1991). This leniency will only lead to abuse of alternative sanctions resulting in the release of more and more dangerous, violent criminals who jeopardize public well-being.

Defendants and defense attorneys both argue about the personal affliction caused by scarlet letters. The public stigma that these probationers carry is far greater than any incarcerated individual experiences. Inmates remain anonymous since they do not walk

the streets announcing their convictions to the world; whereas, the probationer is constantly reminded of his or her crime. The scarlet letter imposition that reduces the inclination not to repeat a crime is, therefore, seemingly more punitive than incarceration (Brilliant, 1989: 1384). The convicted offender released into the community under a scarlet letter is more likely to be shunned from society and publicly humiliated than the imprisoned convicted offender. Additionally, an apology in a local newspaper would appear to be more punitive than a bumper sticker because the offender cannot voluntarily avoid the newspaper ad; whereas, the drunk driver can choose not to drive.

The advantages and disadvantages of scarlet letter probation conditions could serve as a balancing of the elements of punishment and rehabilitation when they are properly mixed to reinforce the gravity of the offense and to encourage the offender to refrain from criminal activity. It should be noted, however, that this mixture cannot be applied to all convicted offenders--each case is different. Moreover, some scarlet letter probation conditions could hamper the statutorily based goals of probation, which appears to be the attitude of some of Nebraska's 4th Judicial District Judges.

CHAPTER VI

THE NEBRASKA EXPERIENCE

According to Nebraska's Department of Corrections, the state's current adult inmate population is 151 percent over capacity. The entire Nebraska prison system is designed to house and feed 1,706 inmates, not the current 2,576 (Nebraska DOC, 1992). Nebraska's Department of Corrections officials state that if something is not done, the system will reach 3,228 inmates by 1996. Both Harold Clarke, Director of Nebraska's Department of Corrections, and G.L. Kuchel, Co-chairman of the Governor's Task Force on Prison Alternatives, feel that probation programs must be expanded and the judiciary must sentence more non-violent offenders to probation. To determine the judicial philosophy concerning special probation dispositions (scarlet letters) as an expansion to probation, an exploratory study of Nebraska's 4th Judicial District judges was conducted (Appendix B). As previously discussed, this might reduce the present inmate population, deter and rehabilitate offenders effectively, be an appropriate type of punishment, and accord protection to society.

The following discussion and analysis of the exploratory study depicts recent judicial considerations toward the use, acceptance and feasibility of scarlet letter sentencing dispositions. Twenty-three judges were surveyed of which twelve responded. The respondent judges were asked to give their opinions about the appropriateness, protection to society, rehabilitation, feasibility, and perceived effectiveness and deterrence of scarlet letter probation conditions.

Nine out of twelve of the respondent judges perceive that incarceration must be the main focus of any punishment scheme. However, at a time when the courts are also overloaded, eight respondent judges accept scarlet letter dispositions as long as they are just, fair, and ethical when administered. Eight out of twelve of the judges also perceive scarlet letters as effective alternatives to deterring both convicted offenders and potential offenders only if social standing within the community is not severely injured. The judges believe that public humiliation does not necessarily result in lack of status anymore than incarceration would. However, a greater impact on the use of scarlet letter sentencing dispositions deterring offenders is that four judges not aware of scarlet letters are more willing to accept and use this form of punishment over incarceration. Seven out of ten respondent judges did not consider scarlet letters as being retributive and capable of restoring public confidence in the criminal justice system.

Generally, the respondent judges in the 4th Judicial District are not familiar with any offender who has been sanctioned to probation with a scarlet letter condition. Three are at least familiar with drunk driving offenders required to display a bumper sticker. Eight out of ten do not perceive bumper stickers as being appropriate for third-time drunk drivers. This could mean that maybe first time offenders should also be given the bumper sticker punishment, or that no offenders should be publicly punished for a drunk driving offense. More importantly, eleven of the twelve respondent judges strongly oppose placing sex offenders in the community with the sign requirement. Furthermore,

no probation condition can be voluntary. As one judge indicated, Nebraska statutes do not allow for probationary conditions to be voluntary.

While scarlet letter dispositions are viewed as being economically sound, ten out of twelve judges believe scarlet letters could be appropriate punishment for those difficult to penalize (i.e., corporations), but would not consider scarlet letters to be effective treatment to rehabilitate or resocialize offenders. Scarlet letters are perceived to be more punitive than standard probation conditions, but less harsh than incarceration. Finally, seven judges perceive that public attitudes toward having offenders in the community on probation with scarlet letter conditions would be offensive, offering no benefit to society, nor increasing protection to society. Again, nine out of ten respondent judges would prefer to continue incarceration. However, five judges fairly new to the judicial bench perceive scarlet letter sentencing alternatives as a good idea and think they should be used more frequently.

SUMMARY OF FINDINGS

Scarlet letter dispositions may not come to fruition within Nebraska's judicial system in the near future. The twelve respondent judges appear not to believe scarlet letters are likely to be of any benefit to convicted offenders, decisionmakers, or society. Furthermore, most respondents do not believe scarlet letter dispositions can restore public confidence in the criminal justice system. Importantly, those who are aware of scarlet letter dispositions are less supportive of them than those who are not. This suggests that efforts to inform judges may be counterproductive and that strong efforts at educating or

lobbying judges about the effectiveness of scarlet letter dispositions would have to accompany attempts at making more judges aware of this form of punishment.

CHAPTER VII

CONCLUSION

Scarlet letter dispositions that aim to warn and educate the public forces citizens to recognize that criminal laws are enforced and should encourage policing of their own activities. While this form of punishment might increase confidence in the criminal justice system, it may not resocialize offenders. On the other hand, scarlet letters might deter future criminality if the public recognizes them as an increased commitment by the judicial, political, and criminal justice system to protect society as a reasonably related goal to punishment. To date the objectives within the criminal justice system and society focus on solutions to the problems within our prison system (i.e., overcrowding and the "too-early" release of offenders). Most states currently strive to develop strategies of alternative sentencing which could be effective and feasible dispositions to alleviate these problems. However, while realizing that problems of prison overcrowding must be resolved, Nebraska judges, for example, perceive scarlet letter dispositions as going beyond efforts to protect society and judicial ethical considerations.

Background literature and interviews suggest that scarlet letters may be more commonly utilized as innovative sanctions imposed on both those difficult to penalize and convicted offenders who do not require imprisonment. Judges around the country are imposing scarlet letter dispositions on convicted offenders based on the severity of the crime, the least amount of state control, and the amount of protection accorded to the public. Judges also appear to believe that incarceration should only be used if necessary.

The respondent judges in Nebraska appear to be of the opinion that scarlet letter dispositions should not be a consideration for alternatives to terms of imprisonment. These attitudes may be consistent with ACLU arguments pertaining to the right of society to be protected against victimization and that scarlet letters are a "silly thing and are only a labeling process designed to allow public ridicule and mocking of convicted offenders" (Kelly, 1989, 784-785; Kuchel, 1992).

IMPLICATIONS

Overcrowded prisons and jails accomplish very little in the way of rehabilitation or punishment when inmate populations exceed 134 percent (Cohen, 1990: 1). Tavill suggests that incarceration is ineffective and no longer can be regarded as the primary form of punishment in the United States (Tavill, 1988: 618). Therefore, unless policymakers and criminal justice personnel make greater efforts to fund and establish statutory probation guidelines with acceptable alternatives, our penal system will continue to overflow.

Alternative sentencings are cheaper and provide a middle ground between incarceration and straight probation (Petersilia, 1990: 24). As yet, it appears as if public apologies and bumper stickers in Oregon, Florida, Oklahoma, and Texas have not cost the public nor the criminal justice system anything⁸ (McCabe, 1991; Reddick, Probation Officer, 1992). Judge Lykos contends that scarlet letter probation conditions such as

⁸The convicted offender pays all court costs, costs incurred for advertising or acquiring the stickers along with a supervisory probation fee of at least \$40.00 per month.

public apologies are most effective on people with middle-class values who are already humiliated enough for having to go through the system (Lykos, 1992). Moreover, special scarlet letter probation conditions may be more conducive punishments for those difficult to penalize, such as the corporation which is often required to perform some form of community service without compensation or even being required to display a bumper sticker. However, Connally (1988) suggests that anyone convicted of drunk driving could be said to lack discipline in indulging in an activity that endangers his life and that of others; therefore, a bumper sticker alerting those around him could be sufficient reason to discriminate against him and any other offender (Connally, 1988: 545).

The bumper sticker does not constitute cruel and unusual punishment as defined by the Supreme Court and as was contested by the Florida Supreme Court in Metcalfe v. Titus and Goldschmitt v. State (McCabe, 1991). "The potential gravity of the offense is the loss of lives"; requiring a bumper sticker is neither "ideological" nor cruel and unusual (McCabe, 1991). Further, the bumper sticker is likely to be upheld under both Fourth and Fourteenth Amendment provisions in that probationers do not enjoy the same fundamental rights as free persons. On the other hand, those stickers alerting motorists to inform authorities which are simply designed to brand the driver as a convicted criminal might be struck down as cruel and unusual punishment (McCabe, 1991).

The results of the exploratory survey of Nebraska's 4th Judicial District judges may or may not be suggestive of how judges nationally perceive scarlet letter sentencing dispositions. Moreover, because none of these judges have imposed scarlet letter

probation conditions on convicted offenders, their attitudes do not necessarily represent how these scarlet letter sentencing dispositions are utilized or whether they are Constitutional. However, moving from incarceration to more community-based sanctions could potentially accomplish both the deterrent effect and increase the public's confidence in our criminal justice system when alternative sentencing, such as scarlet letter probation conditions, reasonably relate to the offense committed. The disgrace factor, if properly utilized, can be a strong deterrent and can often be effective when all else fails (DiGiovanni, 1988: 672).

At issue for the judicial, political, and criminal justice system is whether any form of punishment by humiliation can deter a crime and whether labeling offenders places the interests of society above "the dignity and rights of society's undesirables" (Silverman, 1987: 8). There are problems inherent in these issues in that it is difficult to determine who is actually dangerous to society. Community punishments, such as scarlet letter dispositions, may not be effective when conditions placed on probationers actually depend on offenders' willingness to be rehabilitated. Probation conditions, such as the sex offender signs placed on Bateman may only treat the symptoms rather than the causes. Given that the scarlet letter probation condition to post signs is aimed at keeping the offender away from a situation that might tempt him to commit similar crimes, it can hardly be claimed to reform a repeat sex offender's behavior. It is his psychological deviance that requires treatment; therefore, his medical condition should be appraised by

the sentencing court more than his present action and he should also be committed to an extensive treatment program (not one as a condition of probation).

Any scarlet letter form of punishment sanctioned as a probation condition requirement (e.g., signs on residence doors and cars, public apologies, bumper stickers, and t-shirt labels) may fail in both Constitutional and criminal law areas in that it is at least subject to special scrutiny. According to Edward Silverman (1987), Harvard law school professor, Arthur R. Miller, probably interpreted this issue most clearly when he stated: "society, hoping to send a message to other criminals, would soon resort to hanging signs whenever it deems a person--criminal or not--undesirable, is worrisome" (Silverman, 1987: 8). Miller's argument suggests that the criminal justice system must consider who should be sentenced. The system needs to develop a method that separates the dangerous offender from the non-dangerous when considering punishments.

Who Should Be Sentenced?

For some types of crimes scarlet letter sentencing may be the future trend toward effective alternative conditions. For example, the effect of public apologies is to deter convicted offenders' peers from becoming criminal offenders and protect victims (Reddick, Probation Officer, 1992). According to Nigel Walker (1991), the stigma of being labeled may show the offender he deserved the punishment he received. The unpleasant memory of being labeled may discourage his criminal activity (individual deterrence), that friends, family, and peers persuaded him that his crime was selfishly harmful to others (reform), and a probation supervisor may have found him employment

or some law-abiding activity to pass time (rehabilitation). "Two or more of these processes may produce the deterrence effect and result in the offender being 'corrected'" (Walker, 1991: 42). However, it must be asked whether the punishment fits the crime.

There may be incidents where scarlet letter dispositions may be ineffective, such as that in Bateman's case, when a child is both unsupervised and unable to read or the offender is not at his house or near his car where the signs are posted. The motivation for a sex offender is of such a nature and so compelling that the consequences of his action are not on his mind. A child molester, with or without a sign, is creative and able to conjure up methods to lure children. If he is determined enough he can make himself anonymous anywhere. Additionally, people probably would be extremely negative toward this type of offender living in their neighborhood; the community would feel unprotected. In addition, the economic value of homes in such a neighborhood could drop sharply, thereby punishing the innocent rather than the guilty. Therefore, these kinds of alternatives may be unsatisfactory.

Sanctions, such as bumper stickers and marked plates, or any other type of scarlet letter, will not be effective as a deterrent if the criminal justice system fails to separate those who need to be imprisoned from those who do not. Also, this type sentencing may only be effective on crimes which are acceptable to the public's moral and social attitude. For example, a bumper sticker stating: "*I Am A Convicted Drunk Driver*" would probably draw a less violent reaction than that of Bateman's: "*I Am A Convicted Child Molester.*" The reasons for this may lie in public and judicial attitudes toward victimless

crime or the public's awareness that they themselves have driven automobiles while drunk but just haven't been caught!

NEED FOR FURTHER RESEARCH

The present focus on some 4th Judicial District Court Judges' attitudes toward scarlet letter dispositions and the background literature review is only a beginning to determining whether scarlet letters might be a reasonable, feasible solution to this nations' over crowded prisons and jails, high crime rates, and the goal of protecting the public. The origin of today's scarlet letter punishments needs to be researched to determine if judges are creating scarlet letter punishments on their own or if someone such as the National Center on Institutions and Alternative Sentences (NCIA) are developing them for use by the courts in the sentencing decision-making process. A survey of public attitudes should be conducted to determine if society is willing to accept scarlet letter type punishment in their community. Also, legislatures should be queried about the acceptance of scarlet letter dispositions to determine if it would be feasible to enact laws requiring some offenders to be placed in the community with scarlet letters rather than being incarcerated. Further research that investigates the proliferation and use of scarlet letter sentencings throughout the nation is also required to determine the frequency of use, and the acceptance, feasibility, and effectiveness of such probation conditions. If scarlet letter dispositions increase the perceived threat of punishment to some extent of effectiveness, they would be cheaper than building more (ineffective) prisons. From the perspective of policymakers, it is worth knowing the extent to which

any observed reduction in criminal activity can be attributed to the overall use of scarlet letter dispositions.

Appendixes

Appendix A

State of Iowa Drunk Driving Legislation

July 1, 1991



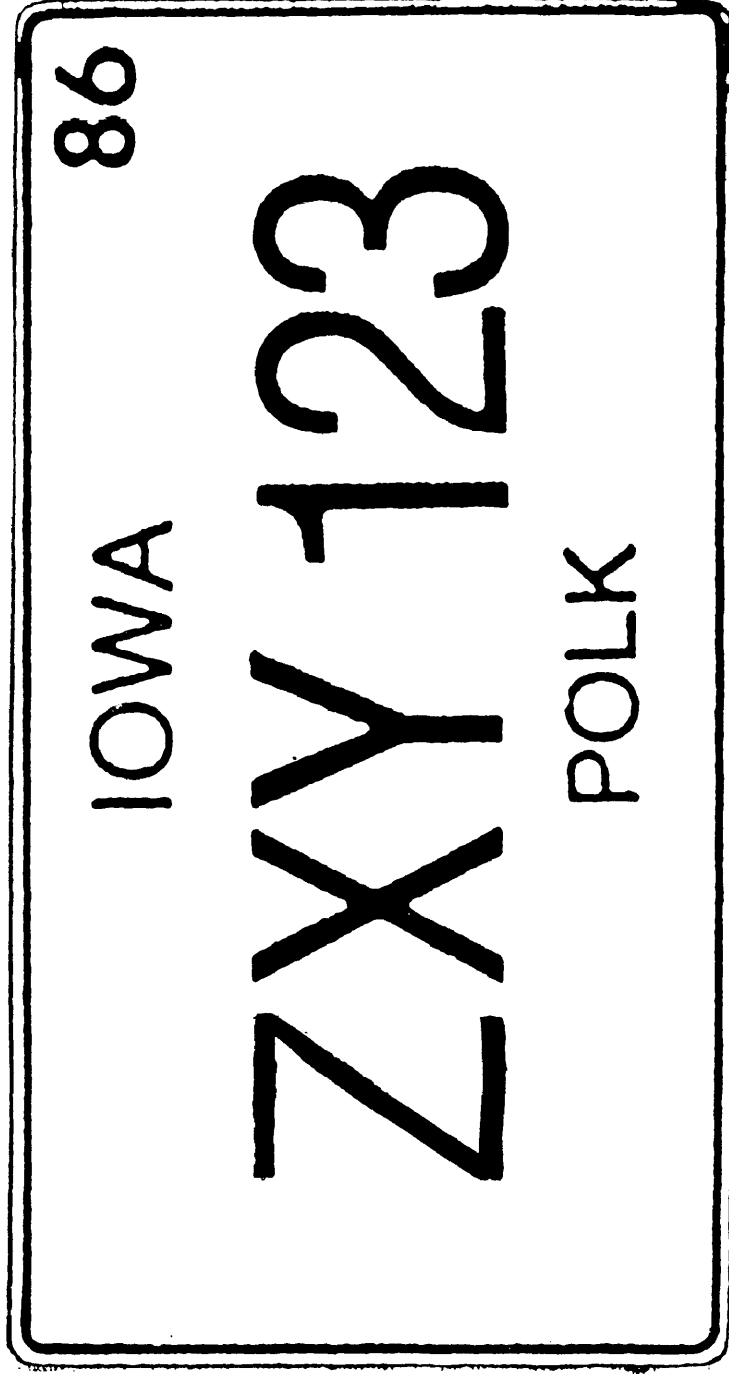
Iowa Department of Transportation

Park Fair Mall, 100 Euclid Avenue
 P.O. Box 9204, Des Moines, Iowa 50306-9204
 515-237-3109

TO: Enforcement Agencies
 ATTENTION: Dennis Ehlert, Director
 OFFICE: Office of Vehicle Registration
 SUBJECT: Implied Consent Plate

- (1) Effective July 1, 1991, special license plates will be available for an owner or lessee of a motor vehicle who has been convicted of a third or subsequent violation of operating a vehicle while under the influence as defined in Section 321J.2 of the Iowa Code.
- (2) Application for and acceptance of the special plates constitutes implied consent for an Iowa law enforcement officer to stop the vehicle bearing special plates at anytime.
- (3) The regular "implied consent" plates are white on blue. The characters are alpha-numeric and issued sequentially. The first alpha character will be a "Z" in all cases so that law enforcement officials can readily identify this special plate.
- (4) This plate will also be available for apportioned commercial vehicles. The plate will be red on white. The characters are alpha-numeric and issued sequentially. The second alpha characters will be a "Z" in all cases.
- (5) A month sticker is required in the lower left corner and a current year validation sticker is required in the lower right corner of the rear plate only. These new plates will be validated annually. These plates shall be validated in the same manner as regular registration plates.
- (6) The following is the numbering series for the Implied Consent plates:
 - Auto: ZA0000---
 - Truck/Tractor ZZ0000-ZZ9999
 - MC ZX0000-ZX9999
 - Prorate PZ0000-PZ9999
- (7) For more information, call the Department of Transportation, Office of Vehicle Registration at 515-237-3109.

DE:cm



86

IOWA

ZXY 123

POLK

7-2-91
DRAFT COPY

TRANSPORTATION DEPARTMENT (761)

Pursuant to the authority of Iowa Code section 307.12, the Department of Transportation hereby gives Notice of Intended Action to amend Chapter 400, "Vehicle Registration and Certificate of Title," Iowa Administrative Code.

ITEM 1. Amend chapter 400 by adding rule 400.60(321J) as follows:

400.60(321J) Registration, sale or transfer of court-impounded vehicles.

400.60(1) Application. The applicant shall submit Form 411131, "Application for Special Registration Plate," and a \$50 fee for each vehicle to be registered. The applicant shall submit the following documents with the application:

- a. A copy of the court order requiring the defendant/owner to surrender the regular registration receipt and plates.
- b. Either the number of the defendant/owner's temporary restricted license or a signed statement of proof listing a member of the applicant's household who possesses a valid driver's license.
- c. Vehicle identification information for each vehicle owned by or registered to the defendant/owner.

400.60(2) Consent to sell. An owner or joint owner of a vehicle must apply to the department for consent to sell a vehicle if the registration receipt and plates for the vehicle have been surrendered to the court or the department, or if special implied consent registration

plates have been issued for the vehicle. The owner shall submit a signed statement certifying that the sale of the vehicle is a good faith sale with a valid money exchange and that the vehicle will no longer be in the custody of the owner.

400.60(3) Leased vehicle. A vehicle leased to a defendant may be registered or sold while the lessee's driver's license is revoked if the owner applies to the department on Form 411131 for approval. The owner shall submit evidence that the lessee will not have control or custody of the vehicle. The department shall consider a cancelled lease as valid proof for re-registration or sale of the vehicle by the owner.

400.60(4) Transfer by operation of law. A vehicle transferred by operation of law may be sold when documentation is provided to the department pursuant to Iowa Code section 321.47.

400.60(5) Surrender to another county. If, when the court issues an impoundment order, the surrendered registration receipt is sent to the wrong county, the county treasurer of that county shall notify the county where the vehicle is registered of the surrendered receipt and impoundment order. The county treasurer in the county of record shall mark the vehicle records to prohibit registration or sale after the court has issued an impoundment order or the department has issued special implied consent plates for that vehicle.

These rules are intended to implement Iowa Code section 321J.4A and 1991 Iowa Acts, House File 709.

*Legal suggested
"County B registration"*

DATE _____

*7-2-91
DRAFT COPY*

DENNIS TICE, DEPUTY DIRECTOR

Appendix B

SURVEY QUESTIONNAIRE FOR FOURTH JUDICIAL DISTRICT JUDGES, NEBRASKA

Hello, my name is Catherine Elwell. I am a graduate student in Criminal Justice at the University of Nebraska, Omaha. The following survey is a significant part of my thesis, "Scarlet Letter Dispositions," which will take only a few minutes of your time to complete and return in the enclosed self-addressed stamped envelope no later than OCTOBER 25, 1991. Identity of respondents is strictly confidential.

Scarlet letter dispositions are innovative alternatives to incarceration posited as special probation conditions granted to offenders by judges who believe these individuals are capable of living in the community (i.e. drunk drivers, sex offenders, thieves, burglars, white collar criminals and corporations). For example, these probation conditions require offenders to publicly disclose their crime by posting signs/bumper stickers on their cars and residences, wear screen printed t-shirts stating the crime, publicly announcing the crime in their local newspapers, or other practices as ordered by the court.

Please circle the appropriate response:

1. How long have you been employed in your present position? _____
2. Gender: 1. Male 2. Female
3. Ethnicity:
 1. White 2. Black 3. Hispanic 4. Asian American
 5. Native American 6. Other
4. Are you aware of scarlet letter sentencing dispositions? (If no, go to No. 7)
 1. Yes 2. No
5. Have you imposed a scarlet letter condition on an offender?
 1. Yes 2. No 3. Not Applicable
6. What type of offenders are you familiar with who have received scarlet letter probation condition(s) at sentencing? (Mark all that applies to you)
 1. Drunk drivers 2. Thieves 3. Burglars
 4. Sex offenders 5. Drug offenders 6. Other _____
 7. Don't know 8. None, we don't use this

The following questions are based on YOUR opinion.

Deterrence

7. Moving away from incarceration can potentially accomplish the deterrent effect.
1. Strongly agree 2. Agree 3. Somewhat agree
4. Strongly disagree 5. Disagree 6. Somewhat disagree
8. Moving away from incarceration can potentially increase the public's confidence in the criminal justice system.
1. Strongly agree 2. Agree 3. Somewhat agree
4. Strongly disagree 5. Disagree 6. Somewhat disagree
9. Scarlet letter sanctions are most likely to deter if social standing is injured.
1. Strongly agree 2. Agree 3. Somewhat agree
4. Strongly disagree 5. Disagree 6. Somewhat disagree
10. Scarlet letter probation conditions may deter potential criminal offenders.
1. Strongly agree 2. Agree 3. Somewhat agree
4. Strongly disagree 5. Disagree 6. Somewhat disagree
11. Scarlet letter probation conditions may deter recidivism of convicted offenders.
1. Strongly agree 2. Agree 3. Somewhat agree
4. Strongly disagree 5. Disagree 6. Somewhat disagree

Fairness/appropriateness

12. Scarlet letter probation conditions are a more conducive alternative to punishment for those difficult to penalize, such as corporations.
1. Strongly agree 2. Agree 3. Somewhat agree
4. Strongly disagree 5. Disagree 6. Somewhat disagree
13. Only third-time drunk driver offenders should be required to place the bumper sticker on their automobiles.
1. Strongly agree 2. Agree 3. Somewhat agree
4. Strongly disagree 5. Disagree 6. Somewhat disagree
14. Sex offenders should be placed in the community on probation with the requirement of posting signs such as "I Am A Child Molester" at their place of residence and on their automobiles.
1. Strongly agree 2. Agree 3. Somewhat agree
4. Strongly disagree 5. Disagree 6. Somewhat disagree

15. *Scarlet letter sentences must be a voluntary condition of probation.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

Effectiveness

16. *Scarlet letter sentencing dispositions are more economically sound than building more jails and prisons.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

17. *Public stigma that scarlet letter probationers carry far outweigh that of incarceration.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

18. *Offenders would rather be incarcerated than be placed on probation with a scarlet letter condition of any type.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

19. *Punishment by humiliation results in lack of status; whereas, incarceration can confer status.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

20. *Scarlet letter conditions only treat the symptoms not the causes of offender actions.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

Rehabilitation/Resocialization

21. *Scarlet letter conditions can rehabilitate/resocialize offenders.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

22. *Sex offenders can be better rehabilitated/resocialized if placed in communities with the scarlet letter probation condition requirement.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

23. *Scarlet letter probation conditions are more punitive than standard probation conditions.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

Protect society:

24. *The public will welcome scarlet letter sanctions as offering greater protection to the community.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

25. *Protection accorded to the public by placing an offender on probation with scarlet letter special conditions ends with the probation period.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

IMPACT/IMPLICATIONS

26. *Scarlet letters may make sense at a time when crime rates are high.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

27. *It would be best to continue to incarcerate offenders than to publicly humiliate them.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

28. *Scarlet letter sanctions are a good idea and should be utilized more frequently.*

1. *Strongly agree* 2. *Agree* 3. *Somewhat agree*
4. *Strongly disagree* 5. *Disagree* 6. *Somewhat disagree*

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